

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Petition for Rulemaking and Declaratory Ruling)	
of Craig Moskowitz and Craig Cunningham)	CG Docket No. 05-338

COMMENTS OF ACA INTERNATIONAL

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EXECUTIVE SUMMARY

Petitioners, Craig Moskowitz and Craig Cunningham, are requesting sweeping changes to the operation of prior express consent under the Telephone Consumer Protection Act (“TCPA”) that will impose substantial burdens to legitimate businesses and hinder timely consumer access to important account-related calls. Given that the Commission has already engaged in several proceedings on the same issues raised by Petitioners, maintained reasonable interpretations of prior express consent that reflect a well-developed record, and are presented with no new material information that undermines its carefully constructed determinations, ACA International respectfully urges the Commission to deny the Petition.

In these comments, ACA offers several reasons why the Petition should be denied. First, ACA argues that the Petition would fundamentally reverse long-established, settled interpretations of prior express consent under the TCPA that have been repeatedly confirmed by the Commission. These interpretations are consistent with congressional intent in treating telemarketing calls and non-telemarketing calls differently and strike the appropriate balance between consumer privacy and consumer access to normal, expected, and desired information. Furthermore, the Commission already specifically considered a written consent requirement for non-telemarketing calls and, based on an extensive record, determined that consumers would be better served by allowing consent to be oral or written for informational calls.

Second, given the Commission’s explicit interpretation of prior express consent in the debt collection context, ACA argues that to the extent the Commission initiates a rulemaking on prior express consent, it should exempt debt collection calls altogether or, at a minimum, make clear that any new rules will apply prospectively only. ACA explains that in light of the 2008 ACA Declaratory Ruling, there is no confusion concerning the provision of prior express consent in the credit and collection context and therefore it should not be disturbed. Also, there are significant restrictions on

debt collection communications imposed by other Federal and State laws and regulations that make debt collection calls a unique type of informational call. ACA points out that Petitioners' request would impose substantial compliance burdens on debt collectors without providing consumers with a corresponding benefit, and that manual dialing is not a viable solution.

Finally, ACA asserts that granting the Petition would exacerbate the disastrous impact of the Commission's wide-sweeping clarifications in the 2015 TCPA Order and lead to even more TCPA litigation abuse, an outcome that harms legitimate businesses seeking to comply with the TCPA as well as consumers who will lose timely access to important account-related information.

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ACA International ("ACA") respectfully submits these comments in response to the Petition for Rulemaking and Declaratory Ruling ("Petition") filed by Craig Moskowitz and Craig Cunningham (collectively, "Petitioners") on January 22, 2017 in the above-captioned proceeding.¹ In the Petition, Petitioners request the Federal Communications Commission ("Commission") to reverse long-standing, fully considered interpretations of prior express consent in the non-telemarketing context under the Telephone Consumer Protection Act ("TCPA").²

Specifically, Petitioners ask the Commission to initiate a rulemaking: (1) to overturn the Commission's interpretation of "prior express consent" which currently includes a consumer expressly providing a telephone number to the caller; and (2) to require that for all calls made to cellular and residential lines subject to the TCPA's prohibitions in 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B), "prior express consent" be (i) express (ii) specifically to receive autodialed

¹ Petition of Craig Moskowitz and Craig Cunningham for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (filed Jan. 22, 2017) ("Petition").

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 ("TCPA").

and/or artificial voice/prerecorded telephone calls, (iii) at a specified telephone number, and (iv) in writing. Finally, Petitioners also request the Commission to issue a declaratory ruling to clarify the meaning of “prior express consent” resulting from underlying Commission orders and rulings.

As these comments demonstrate, Petitioners are requesting sweeping changes to the operation of prior express consent that will impose substantial burdens to legitimate businesses and hinder consumer access to important account-related calls. Given that the Commission has already engaged in several proceedings on the same issues raised by Petitioners, maintained reasonable interpretations of prior express consent that reflect a well-developed record, and are presented with no new material information that undermines its carefully constructed determinations, ACA respectfully urges the Commission to deny the Petition. To the extent the Commission nevertheless moves forward with any new rulemaking, ACA respectfully requests that debt collection calls be exempt or, at a minimum, apply any new rules prospectively only.

I. BACKGROUND ON ACA INTERNATIONAL

ACA is an international trade organization of credit and collection professionals that provide a wide variety of accounts receivable management services. With offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 3,500 members ranging from third-party debt collectors, debt purchasers, attorneys, credit grantors, and vendor affiliates who employ more than 230,000 employees worldwide.

ACA members are governed by myriad federal, state, and local laws and regulations regarding debt collection.³ Indeed, the accounts receivable management industry is unique if only

³ For example, the collection activity of ACA members is governed by the Federal Trade Commission Act, 15 U.S.C. § 45 et seq.; the Fair Debt Collection Practices Act (“FDCPA”), codified at 15 U.S.C. § 1692 et seq.; the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (as amended by the Fair and Accurate Credit Transactions Act); the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq.; the Fair Credit and Charge Card Disclosure Act, 15 U.S.C. § 1637(c), Pub. L. No. 100-583, 102 Stat. 2960; the Federal Bankruptcy Code, Title 11 of the U.S.C., Pub. L. No. 95-598, 92 Stat. 2549; and

because it is one of the few industries in which Congress enacted a specific statute, the Fair Debt Collection Practices Act (“FDCPA”), governing all manner of communications with consumers when recovering payments.

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of debt collection companies, however, are small businesses with nearly 70 percent maintaining fewer than 20 employees.⁴

ACA members contact consumers exclusively for non-telemarketing purposes. The calls do not involve advertising or soliciting the sale of products or services. The purpose of these telephone calls is strictly to facilitate communication with consumers to investigate disputes, assist in the recovery of payment for services rendered, goods that have been received, or loans that have been given, and to explain to the consumer the options available for repayment. The calls made by collection professionals are informational in nature and are never made randomly or sequentially. Debt collectors make individualized, targeted contacts for a very particular purpose.

To effectively assist consumers in repaying their debts, it is essential that debt collectors have the ability to communicate with consumers using the method that is most likely to reach those consumers, including on their wireless telephones. If contact with consumers is unnecessarily impeded, debt collectors lose the ability to share critical information that can help struggling consumers avoid negative consequences, such as adverse information being placed on a credit

numerous other federal, state, and local laws. See, e.g., Illinois Collection Agency Act, 225 ILCS 425 et. seq.; California Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 et seq.; Florida Fair Consumer Credit Practices Act, Fla. Stat. Ann. § 559.55 et seq.; West Virginia Collection Agency Act of 1973, W. Va. Code Ann. § 47-16-1 et seq.

⁴ Josh Adams, Ph.D., Small Businesses in the Collection Industry: An Overview of Organization Size and Employment, ACA International White Paper (August 2016) available at <http://www.acainternational.org/files.aspx?p=/images/40363/aca-wp-smallbusiness.pdf>.

report, litigation, and wage garnishment. Put simply, consumers are best served when debt collectors can engage with them through constructive dialogue.

II. THE PETITION SEEKS TO REVERSE LONG-ESTABLISHED, SETTLED INTERPRETATIONS OF THE TCPA THAT HAVE BEEN CONSISTENTLY CONFIRMED BY THE COMMISSION.

The Commission has specifically addressed the prior express consent issues raised by the Petitioners repeatedly and consistently. There is simply no need or justification which would require the Commission to revisit the same issues again in an additional rulemaking proceeding when there has already been a full record developed on the provision of prior express consent under the TCPA, there are no new or intervening factors presented that were previously unknown to the Commission, and the Commission's longstanding interpretation is clearly reasonable.

A. The Commission's Interpretation of "Prior Express Consent" Reflects Congressional Intent, Is a Permissible Construction of the Statute, and Strikes an Appropriate Balance.

As a threshold matter, "prior express consent" is not defined in the TCPA. Given this, the Commission has used its authority to develop a reasonable interpretation of prior express consent that reflects the overall statutory scheme and effectuates Congress's intent to protect consumer privacy rights while preserving access to important communications that are normal, expected, and desired.

In the 1992 TCPA Order, the Commission addressed the meaning of prior express consent, stating that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."⁵ In adopting this position, the Commission cited the legislative history of the TCPA to support its interpretation as being aligned with congressional intent. For example, the House report

⁵ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, ¶ 31 (1992) ("1992 TCPA Order").

on what ultimately became section 227, states, “[t]he restriction on calls to emergency lines, pagers, and the like [including cellular telephone lines] does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.”⁶ The key for the Commission is that for consent to be express, a phone number has to be knowingly released. This means that “capturing” a consumer’s phone number through mechanisms like a Caller ID or an ANI device without notice to the subscriber would not constitute prior express consent – a reasonable distinction.⁷

Later, in the 2008 ACA Declaratory Ruling, the Commission provided additional clarification about the provision of prior express consent specific to the credit and collection industry.⁸ The Commission stated:

Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the “prior express consent” of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.⁹

The Commission emphasized, however, “that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.”¹⁰ In this context, the Commission clarified that when a consumer knowingly releases his or her wireless phone number during a transaction that results in a debt being owed, for purposes of the TCPA, that action constitutes prior

⁶ House Report, 102-317, 1st Sess., 102nd Cong. (1991) at 13 (emphasis added).

⁷ See 1992 TCPA Order, ¶ 31.

⁸ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, 23 FCC Rcd 559 (2008) (“2008 ACA Declaratory Ruling”).

⁹ Id., ¶ 9.

¹⁰ Id., ¶ 10 (internal citation omitted).

express consent. If the number was not knowingly provided by a consumer, then no prior express consent exists. Likewise, if a wireless number was provided by a consumer but outside the transaction which resulted in the debt being owed, that would also not constitute prior express for related debt collection calls. As such, the Commission's interpretation reflects the reasonable expectation that if a consumer expressly provides a wireless telephone number in connection with incurring a debt then that consumer has expressly consented to be contacted at that number related to that debt.

Most recently, the 2015 TCPA Order left the long-standing interpretation of prior express consent articulated in the 1992 TCPA Order and 2008 ACA Declaratory Ruling intact.¹¹ In fact, the Commission specifically quoted from both underlying actions in the 2015 Order, confirming their continued applicability in determining the provision of prior express consent.¹²

As the above amply demonstrates, the Commission has been considering issues related to the provision of prior express consent for 25 years. It has built a long, well-developed record and has consistently maintained core principles of prior express consent that reflect the TCPA's statutory language, effectuate congressional intent, and strike an appropriate balance between competing policy objectives. There is no compelling reason to move forward with an unnecessary, sweeping rulemaking proceeding that could needlessly disrupt the current framework by imposing additional conditions to the provision of prior express consent for non-telemarketing calls.

¹¹ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (rel. July 10, 2015) ("2015 TCPA Order"). This confirmation is not to be confused with the Commission's separate handling in the 2015 TCPA Order of "called party" for prior express consent purposes which is fundamentally flawed and the subject of a pending appeal in the D.C. Circuit. See *ACA International, et al. v. Federal Communications Commission and United States of America*; Case No. 15-1211.

¹² *Id.*, ¶ 141.

B. The Commission's Decision to Not Impose a Written Consent Requirement for Non-Telemarketing Calls in the 2012 TCPA Order Was Supported by an Extensive Record, Is In the Public Interest, and Should Not Be Reversed.

Not only do Petitioners ask the Commission to reverse its decision in the 2008 ACA Declaratory Ruling, but they also urge the Commission to completely undo its more recent determination in the 2012 TCPA Order that prior express consent for autodialed or prerecorded informational calls can be written or oral.¹³ Although Petitioners concede the Commission has the authority to allow prior express consent to be obtained orally, they nevertheless argue that “[i]ssuing one uniform rule regarding the prior express consent required for autodialed and artificial voice/prerecorded calls would streamline and harmonize the Commission’s regulatory regime.”¹⁴ Seemingly, Petitioners believe that it is more important to have the same prior express consent rule for all categories of calls rather than tailored rules that reflect the fundamental differences between different categories of calls under the TCPA. This completely misses the point that Congress and the Commission have long understood – there are fundamental differences between informational and telemarketing calls that necessitate different treatment.

In the 2012 TCPA Order, the Commission squarely examined the issue of written v. non-written consent for informational calls and flatly disagreed with the Petitioners’ approach. Although the Commission initially proposed requiring written consent for all types of calls, after fully considering the tremendous feedback opposing a written consent requirement for informational

¹³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830 (2012) (“2012 TCPA Order”).

¹⁴ See Petition at 4.

calls, the Commission ultimately decided not to impose a written requirement on non-telemarketing calls:¹⁵

While a few commenters argue that we should require written consent for all autodialed or prerecorded calls (i.e., not simply those delivering marketing messages), we conclude that requiring prior express written consent for all such calls would unnecessarily restrict consumer access to information communicated through purely informational calls ... While we observe the increasing pervasiveness of telemarketing, we also acknowledge that wireless services offer access to information that consumers find highly desirable and thus do not want to discourage purely informational messages. We believe that requiring prior express written consent for all robocalls to wireless numbers would serve as a disincentive to the provision of services on which consumers have come to rely.¹⁶

As the Commission recognized in 2012, and as is still true today, requiring written consent for non-telemarketing calls would contravene public interest by hindering consumer access to important informational calls. The same rationale applies to the additional requirements Petitioners seek to impose. First, it is important to remember that not receiving debt-related communications does not make the debt go away. Second, once this is understood, then it becomes clear that creating overly restrictive barriers to communication between consumers and debt collectors has a cost – it prevents consumers from receiving important account-related communications on their mobile telephones, communications that provide critical information that consumers expect and need to receive to avoid financial harm associated with failure to pay an outstanding debt.¹⁷

The broader public interest would also be harmed if the Commission reversed course and required prior express written consent and/or additional consent requirements in the debt collection

¹⁵ The 2012 TCPA Order was adopted with bi-partisan support on the Commission, with both democrat and republican Commissioners observing the balance it struck. See, e.g. Statement of Mignon Clyburn, 2012 TCPA Order (stating that, “Overall, this is a well balanced Order.”).

¹⁶ 2012 TCPA Order, ¶¶ 20 and 29 (internal citation omitted).

¹⁷ For example, a consumer may experience adverse credit reporting or be the subject of litigation efforts to recover the outstanding debt.

context. It is well documented that American consumers are harmed by uncollected debt through the overall increase of prices and higher interest rates. ACA members play a vital role in recovering and returning to business billions of dollars annually – representing a massive infusion of money into the national economy. Employing modern communications methods to call wireless telephones, which are increasingly becoming the preferred and sometimes only option to contact a consumer, are an integral component of this effort. Despite this, Petitioners are asking the Commission to develop new rules that will unquestionably impede the effective debt recovery process by making essential communication between consumers and debt collectors more difficult. The Commission already has a full record to support its current interpretation of the provision of prior express consent in the debt collection context; there is no reason to go through a duplicative proceeding.

III. TO THE EXTENT THE COMMISSION INITIATES A RULEMAKING ON PRIOR EXPRESS CONSENT, IT SHOULD EXEMPT DEBT COLLECTION CALLS.

Unlike other informational calls, the Commission specifically clarified prior express consent in the debt collection context in the 2008 ACA Declaratory Ruling. Because of this, along with the reliance debt collectors placed on that ruling and the unique features of informational debt collection calls, ACA respectfully urges that debt collection calls be exempt from any potential future rulemaking on prior express consent based on the Petition. At a minimum, it is imperative that the Commission apply any new prior express consent rules to debt collectors prospectively only.

A. The Commission's Treatment of Prior Express Consent in the Debt Collection Context has been Clear Since the 2008 ACA Declaratory Ruling and Should Not Be Disturbed.

To the extent the Commission grants the Petition and moves forward with a rulemaking proceeding, it is imperative that the Commission leave the 2008 ACA Declaratory Ruling undisturbed. As described above, the Commission already fully considered the issue of prior express consent specifically in the debt collection context and determined that when a consumer provides a wireless

telephone number in connection with incurring a debt, that consumer has expressly consented to receive calls at that number regarding the collection of that debt. The contours of this position are clear, well balanced, and reflective of the statute and congressional intent. As a result, to the extent the Commission finds there is any meaningful confusion surrounding the current interpretation of prior express consent, it is limited to circumstances that fall outside the credit and collection space. Thus, any action the Commission takes in response to the petition should not apply to debt collection calls nor upset the well-established position on prior express consent articulated in the 2008 ACA Declaratory Ruling and repeatedly confirmed thereafter.

B. Debt Collection Communications are Unique Because They are Governed by Numerous Other Federal and State Consumer Protection Laws Outside the TCPA.

Furthermore, as the Commission is already aware, countless Federal and State consumer protection statutes exist to protect consumers when communicating with debt collectors.¹⁸ These laws and related regulations differentiate debt collection calls from other categories of calls by providing consumers with additional rights and imposing additional obligations on callers that go beyond the TCPA.

Primary among these laws is the FDCPA which governs all communications regarding the collection of consumer debts.¹⁹ The FDCPA is a strict liability statute that subjects violators to administrative enforcement and civil liability, including class action exposure. One of the important rights bestowed upon consumers by the FDCPA is the right to require a collector to cease communications. Specifically, under § 805 of the FDCPA, consumers may send a debt collector a notice to cease communications in connection with the collection of a debt, or the consumer may send a notice that he or she refuses to pay a debt. This means that even if a consumer expressly

¹⁸ See *supra* n. 3.

¹⁹ 15 U.S.C. § 1692 et seq.

provided a wireless telephone number when, for example, filling out a credit application, the consumer nevertheless retains the authority to stop debt collection calls at that number under the FDCPA. This gives consumers control over their privacy rights that is unique to the debt collection space.

As this example demonstrates, the Commission's TCPA rules that apply to debt collectors are supplemental to a comprehensive consumer protection framework that gives consumers important rights throughout the collection process. The Commission's interpretation of prior express consent in the 2008 ACA Declaratory Ruling and thereafter recognizes the unique circumstances surrounding debt collection communications, appropriately complements the existing framework, and should not be reversed or changed.

C. Granting the Petition Would Impose Heavy Compliance Burdens on Debt Collection Callers Seeking to Communicate Targeted Account-Related Information Without a Corresponding Benefit to Consumers.

The Petitioners attempt to entice the Commission to grant its request, in part, because doing so would only require "several simple revisions" to the existing regulations on the subject.²⁰ This is irrelevant and should have no influence on the Commission's disposition of the merits of the Petition. While it may not be difficult to change the language of the TCPA regulations to match the Petitioners' request, the substantive impact of those "simple revisions" would be enormously negative for debt collectors who rely on these settled interpretations and have invested heavily to ensure compliance with them.

Not only would consumers be harmed by making it harder for those in the credit and collection industry to make timely account-related calls as described above, but imposing the sweeping changes requested by Petitioners would require significant changes to the current practices of ACA's members. Debt collectors have developed extensive compliance procedures in reliance on

²⁰ See Petition at 4.

the Commission's clearly articulated, long-standing interpretation of consent in the debt collection context and it makes no sense to disrupt those in the absence of any new information that materially affects the Commission's multiple rulings on this subject.

Furthermore, the practical impact of complying with the new version of prior express consent advocated by Petitioners would be heavily burdensome to debt collectors. Instead of being able to rely on the telephone number expressly provided by a consumer as evidence of prior express consent, debt collectors would likely have to scrub all telephone numbers provided by a creditor to determine which are wireless numbers, manually dial those until a live, right party contact is made (which often takes several attempts over a period of time), send a form to obtain written consent to use modern technology to dial that wireless number, and then wait until that form is sent back with the required written authorization. Not only would this process clearly be burdensome, but it would also be significantly more time consuming than what is currently required, exposing consumers to potential financial harm by making timely communication about a debt more difficult. These burdens are especially heightened for small business debt collectors who, due to their size, will have a harder time absorbing the additional costs and time commitment that would be required to comply with Petitioners' misguided request.

Moreover, imposing additional burdensome regulations is in direct opposition to the new Administration's aim to reduce regulatory burdens. Specifically, Executive Order 13777 directs the heads of executive agencies to alleviate unnecessary regulatory burdens, including by identifying regulations that are, among other things, "unnecessary" or "impose costs that exceed benefits" for repeal, replacement, or modification.²¹ Although the Commission is an independent agency,

²¹ Executive Order 13777, Enforcing the Regulatory Reform Agenda, February 24, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>.

granting a Petition that would impose significant new burdens to legitimate businesses without a clear corresponding benefit to consumers undermines the President's regulatory reform agenda and should be avoided.

D. The "Option" of Increased Manual Dialing Does Not Benefit Consumers Who Owe a Debt and Need Access to Timely, Private Account Information.

In addition, the Petitioners' assertion that "industries also will continue to be able to place live, individually dialed calls without running afoul of the TCPA, as they always have been able to do" does little to detract from the harmful consequences of the sweeping changes they ask the Commission to make.²² Modern calling technology is precise and maximizes consumers' privacy by eliminating dialing errors that risk inadvertent contacts with individuals other than those responsible for the debt. In addition, autodialers are programmed to restrict calls to designated area codes within the calling times prescribed by law. This technology allows for a timely, cost effective, and reliable way for consumers to learn about their accounts and arrange for payment in a way that manually dialing does not. While autodialed telemarketing calls are about speed and quantity, autodialed debt collection calls are about accuracy and precision. This core difference alone justifies why the Commission should continue to treat prior express consent differently in the debt collection context than in the telemarketing context.

IV. GRANTING THE PETITION WOULD EXACERBATE THE DISASTROUS IMPACT OF THE COMMISSION'S 2015 TCPA ORDER AND LEAD TO FURTHER TCPA LITIGATION ABUSE.

Despite substantial evidence in the Commission's TCPA docket of how important the use of modern communications technology is to communicate normal, expected, and desired information to consumers,²³ the Commission nevertheless adopted a series of "clarifications" in its 2015 TCPA

²² Petition at 4.

²³ See e.g., comments in support of the Petition for Rulemaking filed by ACA International in CG Docket No. 02-278 (Jan. 31, 2014) ("ACA Petition") which sought clarifications to the Commission's TCPA rules that would allow legitimate businesses to use modern dialing technology to call

Order that have exposed legitimate businesses to enormous TCPA liability each time a call is made to a wireless telephone number.²⁴ By expanding the definition of an automatic telephone dialing system to include virtually all modern calling equipment while at the same time significantly reducing the reliability of prior express consent, the 2015 TCPA Order essentially forces debt collectors to either forego using efficient and effective dialing systems to reach specific consumers or face enormous liability risk for each call placed to a wireless telephone. In response, then-Commissioner Pai issued a scathing dissent, emphasizing how the Commission's broad clarifications would do more to enrich trial attorneys than help consumers:

Rather than focus on the illegal telemarketing calls that consumers really care about, the Order twists the law's words even further to target useful communications between legitimate businesses and their customers. This Order will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public.²⁵

While the 2015 TCPA Order is currently being challenged by ACA and others in the D.C. Circuit Court of Appeals,²⁶ granting the sweeping changes urged by Petitioners here would expose legitimate businesses to even greater TCPA liability exposure by attaching additional requirements to the provision of prior express consent in the non-telemarketing context. Put simply, adding more requirements to prior express consent for informational calls placed by legitimate businesses

consumers on their wireless telephones without being exposed to massive liability risk, including, e.g., the American Financial Services Association (Mar. 24, 2014); Coalition of Higher Education Assistance Organizations (Mar. 24, 2014); Professional Association for Customer Engagement (Mar. 24, 2014); Student Loan Servicing Alliance and SLSA Private Loan Committee (Mar. 24, 2014).

²⁴ See Statement of Commissioner Michael O'Rielly, Dissenting in Part and Approving in Part, 2015 TCPA Order, at 138 (stating the actions the Commission took in the 2015 TCPA Order are certain to "lead to more litigation and burdens on legitimate businesses without actually protecting consumers from abusive robocalls made by bad actors.").

²⁵ Dissenting Statement of Commissioner Ajit Pai, 2015 TCPA Order, at 113 (international citation omitted) ("Pai Dissent").

²⁶ In response to the 2015 TCPA Order, ACA and nine other diverse businesses and organizations filed lawsuits seeking judicial review of the Order. All of the petitions for review were consolidated into a single case before the D.C. Court of Appeals titled *ACA International, et al. v. Federal Communications Commission and United States of America*; Case No. 15-1211.

presents new territory for opportunistic trial attorneys to exploit. Because there are no limits on damages, and very low barriers to filing even the most frivolous of lawsuits, TCPA lawsuits are highly attractive. As a result, companies are increasingly being forced to choose between settling quickly or betting the future of the company in court, where damages can easily total millions of dollars even when the communication does not undermine any consumer policy, and even when there is no actual consumer harm. This is not mere speculation. In his same dissent, then-Commissioner Pai described how “trial lawyers have found legitimate, domestic businesses a much more profitable target” than illegal telemarketers, noting that “a trial lawyer can collect about \$2.4 million per suit by targeting American companies.”²⁷ The changes urged by Petitioners would unquestionably contribute to this unfair landscape. Thus, instead of reversing long-standing TCPA interpretations that will further add to the TCPA’s reputation as a “poster child for lawsuit abuse,”²⁸ the Commission should deny the Petition and focus on ways to restore the balance that has been lost in TCPA regulations.

V. CONCLUSION

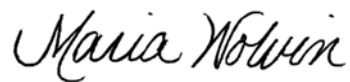
Petitioners are requesting sweeping changes to the operation of prior express consent in the non-telemarketing call context. However, unlike the Commission and Congress, Petitioners do not seem to grasp the fundamental differences between informational and telemarketing calls that logically lead to their distinct treatment under the TCPA. In addition, Petitioners fail to understand the practical impact of their request to reverse long-established Commission positions on prior express consent, i.e. consumers’ access to timely and critical account-related information will be hindered while legitimate companies will be heavily burdened and exposed to even greater frivolous TCPA liability.

²⁷ See Pai Dissent at 113.

²⁸ See *id.*

For these reasons – along with the fact that the Commission has already engaged in several proceedings on the very issues raised by the Petition, the Commission has been consistent in its reasonable interpretations of prior express consent, and Petitioners have not demonstrated any new material information to call into question the Commission’s determinations – ACA respectfully urges the Commission to deny the Petition. To the extent the Commission nevertheless moves forward with any new rulemaking on prior express consent, ACA respectfully requests that debt collection calls be exempt or, at a minimum, apply any new rules prospectively only.

Respectfully submitted,



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